Minister for Home Affairs, Malaysia v *Karpal Singh.*[1] In delivering the judgment of this court, the Acting Lord President said:

> We are of the view that r 93(1), on its proper construction, cannot be invoked to secure the presence of a detainee in any criminal or civil court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the court itself requires the presence of the detainee, for instance where the court is satisfied that a detainee is a necessary witness to a criminal or civil matter before the court, or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case.

A detainee discharging his solicitors in order to argue his own case or that he prefers to act as his own advocate can never by itself be a sufficient reason to issue an order to produce under r 93(1). In this case the excuse that the respondent's counsel was unable to get adequate instructions is not easily acceptable. The facts of this case and the chronology of events clearly show that the respondent deliberately discharged his solicitors so that he could ask to be produced in person.

The order of the learned judge must accordingly be set aside.

Appeal allowed.

Order accordingly.

Reported by *Prof Ahmad Ibrahim*

Gula Perak Bhd v Agri-Projects (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION NO D3-33-6-88
VC GEORGE J
30 AUGUST 1988

Civil Procedure – Petition by company to approve scheme of arrangement – Application by intervener for security for costs – Whether petitioner company should be ordered to provide security for costs – Companies Act 1965, s 351(1)

Companies and Corporations – Petitioner company seeks court order to approve scheme of arrangement – Application by intervener for security for costs – Whether petitioner company should provide security for costs – Companies Act 1965, ss 176, 351(1)

The respondent intervener in this application invokes s 351(1) of the Companies Act 1965 and seeks an order that the petitioner company provide sufficient security for costs in respect of the petition vis-à-vis the respondent intervener.

The petitioner had filed its petition on 15 February 1988 pursuant to s 176 of the Companies Act 1965 and seeks the sanction of the court in respect of a scheme of arrangement, one main feature of which is that its creditors accept some 40 cents in the ringgit by way of a compromise. The respondent intervener is a creditor of the petitioner to whom is owed some $70,000. If the petitioner is successful in its petition the respondent intervener will get some $28,000 instead of the right to the $70,000. The total debts of the petitioner run into millions of Malaysian dollars. Apparently all the creditors save the respondent intervener support the proposed scheme.

The first question to resolve is whether s 351(1) applies to a petitioner seeking a s 176 sanction. Counsel for the petitioner contends that the discretion should be exercised in favour of the petitioner for three main reasons:

(i) delay
  (a) there had been no prior demand for security for costs;
  (b) in any event the application was not made promptly;
(ii) the petition is not frivolous or lodged mala fide;
(iii) competing interests of the petitioner and the respondent intervener.

Held, allowing the respondent intervener's application in part:

(1) The rule provided by s 351 is the exception to the general rule and the burden is on the plaintiff, once it is established that it will be unable to pay costs, to satisfy the court why security for costs should not be ordered.

(2) The lack of a prior demand was inconsequential (the need for a prior demand for security for costs referred to in *Menon* v *Abdullah Kutty*[7] was in a context different from a s 351 situation), and there was no inordinate delay and in any event such delay as there was should not be allowed to prejudice the respondent intervener's application for security for costs to be incurred (as opposed to such costs as had already been incurred).

(3) In the face of their valuers' report which valued lands of the petitioner at some $7 million as opposed to the petitioner's valuation of some $24 million for the same lands, the value of the lands is relevant in giving consideration to the scheme proposed by the petitioner and it cannot be said (and the petitioner in fact does not say) that the objections raised by the respondent intervener are frivolous or are not made bona fide.

(4) Though the court should in exercising its discretion have a predisposition towards granting the security sought, on the facts of the instant case, even applying the unfettered discretion approach taken by Lord Denning, the conclusion to be arrived at is that the petitioner should be ordered to provide security for costs.

(5) By a s 351 application, the security for costs to be provided is for costs to be incurred post-application and not for previous costs incurred. On that basis, the application is disallowed in respect of costs previously incurred and the petitioner should provide within 60 days suitable security for payment of costs up to an amount of $150,000 only.

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 145 of 1988.]

Cases referred to

1 *Crystal Theatres Ltd* v *Fuss & Johns* (1940) 57 NSWWN 107 (refd)
2 *Sir Lindsay Parkinson & Co Ltd* v *Triplan Ltd* [1973] 2 WLR 632(refd)
3 *Westralian Gold Mines Ltd* v *Westralian Minerals & Drilling Pty Ltd* (1986) 4 ACLC 167 (refd)
4 *Buckley* v *Bennel Design & Construction Pty Ltd* (1974) 1 ACLR 301 (folld)

5 *Quality Tractors (M) Sdn Bhd* v *United Asian Bank Bhd* [1980] 1 MLJ 95 (refd)
6 *A Co* v *K Ltd* [1987] 3 All ER 377 (refd)
7 *Menon* v *Abdullah Kutty* [1974] 1 MLJ 130 (distd)
8 *J & M O'Brien Enterprises Pty Ltd* v *The Shell Co of Australia Ltd* (1982-83) 7 ACLR 790 (folld)

Legislation referred to
Companies Act 1965 ss 176, 351(1)
Rules of the High Court 1980 O 5 rr 1, 5

Grace Lim for the petitioner.
Anthony Dason for the respondent.

Cur Adv Vult

VC George J: By this application the respondent intervener invokes s 351(1) of the Companies Act 1965 and seeks an order that the petitioner company provide sufficient security for the costs in respect of the petition vis-à-vis the respondent intervener.

The petitioner had filed its petition on 15 February 1988 pursuant to s 176 of the Companies Act 1965 and by which the petitioner seeks the sanction of the court in respect of a scheme of arrangement one main feature of which is that its creditors accept some 40 cents in the ringgit by way of a compromise. The respondent intervener is a creditor of the petitioner to whom is owed some $70,000. If the petitioner is successful with its petition the respondent intervener will get some $28,000 instead of the right to the $70,000. The total owings of the petitioner runs into several millions. Apparently all the creditors save the respondent intervener support the proposed scheme.

The first question to resolve is whether s 351(1) applies to a petitioner seeking a s 176 sanction. The subsection is reproduced:

> 351(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The interpretation section of the Courts of Judicature Act 1964 defines an action to mean civil proceedings commenced by a writ or in such other manner as prescribed by Rules of Court. 'Proceeding' is defined to mean any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding. The English Supreme Court of Judicature Consolidation Act 1925, a commentary of which is found in Vol 2 of the *Supreme Court Practice 1967* condescends, as it were, into more particulars vis-à-vis definitions than our Courts of Judicature Act. In the interpretation section of the English Act (s 225) apart from the definition for 'action' which is similar to the definition of that word in our Act the word 'plaintiff' is defined to include 'every person asking any relief (otherwise than by counterclaim as a defendant) against any other person by any form of proceedings whether the proceeding is by action, suit, petition, motion, summons or otherwise': see Vol 2 of the *Supreme Court Practice 1967* paras 3501 and 3507.

Now O 5 r 1 of the Rules of the High Court 1980 ('RHC') provides for proceedings to be begun by writ, originating summons, originating motion or petition. Rule 5 provides that proceedings may be begun by originating motion or petition only if by the RHC or under any written law proceedings in question are required or authorized to be so begun. Order 88 specifically deals with proceedings arising from the provisions of the Companies Act and r 5 of that Order provides, inter alia, for a s 176 application to be made by petition. Order 9 deals generally with court proceedings begun in the High Court by petition and r 21(1) of that Order provides that every petition must include 'a concise statement of the nature of the claim made or relief or remedy required in the proceedings begun thereby'. It is significant to note that this requirement is in pari materia with the requirements of O 6 r 2(1)(a) which provides that proceedings which are begun by writ must be indorsed with a statement of claim or with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby.

It seems to me fairly obvious that the Rules equate a petition with an action and a petitioner with a plaintiff. In the instant case it is relevant to consider whether the petitioner in fact seeks some claim, relief or remedy as against the respondent intervener. The respondent intervener is admittedly entitled to be paid $70,000 as money owed by the petitioner. By this petition the petitioner seeks to have that entitlement reduced to some 40% of the amount owing. Clearly that amounts to the petitioner seeking a form of relief as against the respondent intervener (and all the other creditors).

In New South Wales where there are similar provisions for a plaintiff company to provide security for costs and where as in Malaysia the word 'plaintiff' is not defined, in *Crystal Theatres Ltd* v *Fuss & Johns*[1] the New South Wales court preferred to give a wide rather than narrow meaning to the word in a s 351 type of context, as I do here, wide enough to include the petitioner in a s 176 application. Although in the context we do not have a statutory definition of the word 'plaintiff' I think we should give it the meaning given to it in the English Supreme Court of Judicature Consolidation Act 1925.

Now the provisions of s 351 provide the exception to the general rule that a plaintiff should not be precluded from pursuing the claim even though it is obvious that he is so impecunious that he will not be able to meet the

costs of the defendant if he fails in the action and is ordered to pay costs.

In England at one time it was thought that the defendant seeking such security for costs pursuant to a s 351 type of situation was entitled to it as of right. Later cases suggest that whether security for costs should be ordered was in the discretion of the court. One school of judicial thought was that such a discretion was to be exercised with a bias in favour of the defendant applicant while another school took the view that the discretion was not to be fettered by any such bias.

In *Sir Lindsay Parkinson & Co Ltd* v *Triplan Ltd*[2] Lord Denning MR at p 645 of the report discusses the issue of discretion and the attitude the English courts have taken in respect of it and arrives at his own view that the judge has a discretion whether to order security or not and that there should be no burden or bias one way or the other in that it is a discretion to be exercised in all the circumstances of the case. In that same case Cairns LJ took the view that he was inclined towards a predisposition in favour of the defendant applicant. The third member of the quorum, Lawton LJ, noting the difference of emphasis between the judgment of Denning MR and Cairns LJ went on to say that he shared the view taken by Lord Denning that the discretion ought not to be hampered by any special rules or regulations nor ought it to be put into a straight jacket by considerations of burden of proof.

The attitude taken in Australia is discussed in *Westralian Gold Mines Ltd* v *Westralian Minerals & Drilling Pty Ltd*[3] at p 173. Some courts took the view taken by the majority in *Sir Lindsay Parkinson*[2] but in *Buckley* v *Bennel Design & Construction Pty Ltd*,[4] the Court of Appeal of New South Wales took the view that although the court's discretion is unlimited the consistent approach by the courts to the section indicated some predisposition in favour of the defendant applicant.

In *Quality Tractors (M) Sdn Bhd* v *United Asian Bank Bhd*[5] LC Vohrah J preferred to follow the Denning view expressed in *Sir Lindsay Parkinson & Co Ltd.*[2] With respect I am inclined to follow the 'consistent approach' that was noted in *Buckley* v *Bennel Design & Constructions Pty Ltd*[4] of a predisposition in favour of the defendant applicant seeking security for costs against an impecunious plaintiff which was the approach preferred by Cairns LJ expressed as the minority opinion in *Lindsay Parkinson & Co Ltd.*[2] The rule provided by s 351, as has been seen, is the exception to the general rule and it seems to me that the burden is on the plaintiff, once it is established that it will be unable to pay the costs, to satisfy the court why security for costs should not be ordered.

In the instant case it is admitted that the petitioner is insolvent. Accordingly it is for it to satisfy the court why security for costs should not be ordered.

Cik Grace Lim for the petitioner in a comprehensively-argued submission went on to contend that the discretion should be exercised in favour of the petitioner for three main reasons:

(1) Delay.
  (a) There had been no prior demand for security for costs.
  (b) In any event the application was not made promptly.
(2) The petition is not frivolous or lodged mala fide.
(3) Competing interest of the petitioner and the respondent intervener.

My view on them is as follows.

Delay

Many of the cases cited where delay was held against the defendant applicant were in respect of applications for security for costs at the appellate stage. In *A Co* v *K Ltd*[6] Sir John Donaldson MR, in dealing with an application for security for costs made some 14 days before the hearing of an appeal which had been preferred some 14 months earlier, said:

> I appreciate that in the trial divisions it is possible to make applications for security at a comparatively late stage. The Registrar of Civil Appeals held, and I think he held rightly, that the same principles do not apply in relation to appeals. Every citizen is entitled to have his day or days in court in having his dispute resolved. When it comes to the appellate process the position is different. The duty of the Court of Appeal is in a sense a supervisory duty. It has to ensure that the trials are conducted correctly and that the result is in accordance with law. But it is a jurisdiction which has to be exercised with the maximum possible expedition, as otherwise successful plaintiffs, like the applicants in this case, might well be deprived of the fruits of their judgments. Therefore this court has always taken the line that there must be strict compliance with timetables laid down, in stark contrast to the attitude taken by the trial courts. Again, in deciding whether to strike out appeals on account of delay this court has not had regard to whether the respondent has been prejudiced. It has simply said that the timetables laid down are to be strictly complied with in the interests of all who resort to the Court of Appeal.

The petition in the instant case was filed on 15 February 1988. The respondent's application to intervene was filed on 16 March 1988 which resulted in a consent order dated 8 April 1988 which purported to set out directions in respect of the conduct of the matter.

In the meantime there was the application of one Varghese Mathai to intervene in the proceedings. The hearing and disposal of that application held up the hearing of the petition. Then there came for disposal certain issues taken by way of preliminary objections by

the petitioner arising out of the non-calling of Lew Chin Chuan who under the terms of the said consent order was to be made available by the respondent intervener for cross-examination.

I pause to note that in the normal course of events it would have been a year or more before a date for hearing of the petition, the hearing of which was going to take more than three days, would have been allotted. Here on the urging of counsel for the petitioner special and early dates were allotted at the expense of other litigants in front of the long queue.

Now, no doubt that it was in the middle, as it were, of the taking of the evidence that the application for security for costs was filed on 13 July 1988. However, as Encik Anthony Dason of counsel for the respondent intervener pointed out, sometime earlier in July he had given notice in open court that the application was going to be filed. It is to be further noted that the court was prevailed upon to take the evidence of two witnesses called by the petitioner for the personal convenience of those witnessess (one of them I think was getting married) although the petition was really not ready for disposal. In the event the substantive hearing of the petition took off only on 27 June 1988.

It was explained on behalf of the respondent intervener that it had sought a valuation from valuers called Majid & Co and apparently it was only on 5 July 1988 that Majid & Co submitted their bill. Apparently it was the quantum of the bill that directed the attention of the respondent intervener to the question of security for costs.

In all the circumstances I was of the opinion that the lack of a prior demand was inconsequential (the need for a prior demand for security for costs referred to in *Menon v Abdullah Kutty*[7] was in a context different from a s 351 situation) and that there was no inordinate delay and in any event such delay as there was should not be allowed to prejudice the respondent intervener's application for security for costs to be incurred (as opposed to such costs as had already been incurred).

Petition not frivolous and not brought mala fide

In the context of a s 351 application, that the proceedings were initiated bona fide and is not frivolous are not relevant. What would be relevant is that the opposition to the proceeding is not made bona fide or is otherwise frivolous or vexatious. The respondent intervener alleges misrepresentation on the part of the petitioner in persuading the creditors and in trying to persuade the court to consent to the scheme. In the face of their valuers' report of valuation which values lands of the petitioner at some $71 million as opposed to the petitioner's valuation of only some $24 million for the same lands, the value of which lands is relevant in giving consideration to the scheme proposed by the petitioner, it cannot be said (and the petitioner in fact does not say) that the objections raised by the respondent intervener are frivolous or are not made bona fide.

Competing interest

In *J & M O'Brien Enterprises Pty Ltd* v *The Shell Co of Australia Ltd*,[8] in exercising its discretion in an application by the defendant for security for costs as against an impecunious plaintiff, the Federal Court of Australia held that competing interests of the parties should be weighed and in doing so the factors to be considered included whether the issues raised are bona fide questions of substance, the relationship between the parties, delay in applying for the security and whether an order for security would prevent or inhibit the appellant from proceeding with the appeal. Another factor considered (but left out in the headnote to the report) is the prospect of the plaintiff succeeding. With respect I would go along with that approach taken by the Australian Federal Court.

Delay and bona fide questions of substance have been dealt with. As to the relevance of the factor of the prospects of the petitioner succeeding, the thinking is that if the petitioner (or plaintiff) has a strong and apparently meritorious case the court would be reluctant to make an order in respect of security for costs that may have the effect of shutting the petitioner (or plaintiff) out. In the instant case even though the hearing can be said to have got to about half way it is not possible to gauge the prospects of one side or the other succeeding. Similarly on the facts of this case nothing turns vis-à-vis the relationship between the parties which is, as far as is known, that of a straightforward creditor/debtor relationship. This leaves the important question of whether an order for security for costs would inhibit or prevent the petitioner from proceeding with the petition and the effect the answer to that question would have on the court in exercising its discretion.

Encik Anthony Dason of counsel for the respondent intervener pointed to the terms of the scheme as proposed by Bumiputra Merchant Bankers Bhd exhibited in the bundle IPB at p 166 and in particular to p 177 where it is seen that provisions are made for payment of receivers' expenses and other liabilities and expenses and reconstruction expenses and working capital in the hefty sum of $6.621 million. However, a close perusal of p 177 shows that the money will only be available if the scheme is approved, sanctioned and implemented. But the indisputable fact is that, inter alia, receivers have been appointed and are functioning as such and valuers, merchant bankers and solicitors including leading counsel have been appointed and have acted for and advised and

continue to advise the petitioner in respect of the scheme. The fees and other expenses these functionaries (if I may collectively call them that) must have charged and incurred and will continue to charge and incur will not be small amounts and no doubt the petitioners have found means to provide for such fees and expenses and such further fees and expenses that will be incurred. To move for a s 176 sanction the incurring of such fees and expenses are inevitable. So are the costs of those who oppose the petition. Knowing that there is that s 351 statutory exception to the general rule, generally speaking any impecunious company that proceeds to litigation should do so in the knowledge and anticipation that it can be required to provide the s 351 security. It seems to me that in the instant case in as much as the petitioner would not have embarked on the petition without making provision for payment of the expenses and fees of the receivers, merchant bankers, solicitors, counsel and valuers and so on it should not have so embarked on the exercise without making provision for the providing of security for the costs of bona fide objectors to the petition.

While I am of the view that the court should in exercising its discretion have a predisposition towards granting the security sought, on the facts of the instant case even applying the unfettered discretion approach taken by Lord Denning the conclusion to be arrived at is that the petitioner should be ordered to provide security for costs.

On the quantum of costs counsel for the petitioner have not taken issue with the $250,000 that was suggested by Encik Dason (of which some $120,000 is for valuers' fees) no doubt because they consider as I do that the amounts asked for in the case of the valuers' fees is prescribed and $130,000 as the rest of the costs is not unrealistic. However, I was of the view that by a s 351 application the security for costs to be provided is for costs to be incurred post-application and not for previous costs incurred. On that basis I disallowed the application in respect of costs previously incurred and ordered that the petitioner provide suitable security for payment of costs up to an amount of $150,000 only. I allowed the petitioner 60 days to provide the security.

Order accordingly.

Solicitors: *Rashid & Lee; Dason & Co.*

Reported by *Wong Kim Fatt*

Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C6837 OF 1985
SHANKAR J
8 JULY 1987

Civil Procedure – Injunction – Application to set aside – Principles for granting injunction – 'Clean hands' in equity – Non-disclosure of material facts – Where damages adequate remedy no injunction should be granted – Balance of convenience – Undertaking as to damages

Companies and Corporations – Company land charged to bank for loan – Company defaulted in repayment of loan – Foreclosure proceedings – Loan agreement and debenture as collateral security – Guarantee agreement – Loan to finance acquisition of company shares – Dispute on validity and legality of transaction – Whether transaction contravened s 67 of Companies Act 1965 and guidelines of Foreign Investment Committee – Validity of board meeting – Companies Act 1965, s 67

The plaintiffs are minority shareholders in the 11th defendant United Securities Sdn Bhd ('United Securities') which borrowed the equivalent of M$43,850,000 ('the said loan') from the first defendant, Overseas Union Bank Ltd ('the defendant bank'). By way of collateral United Securities executed a loan agreement and a debenture. The plaintiffs as directors and the tenth defendant, Dato Abdullah Mohamed, as Chairman of United Securities executed a personal guarantee for the said loan.

The case centres around 16 lots of land ('the said land') registered in the name of the 12th defendant, City Centre Bhd ('City Centre'). City Centre had an issue share capital of 2,500,000 shares of $1 each. Ban Lee Sdn Bhd ('Ban Lee') was the registered owner of 1,250,000 shares or a 50% interest therein. United Securities held the other 50%. By an agreement dated 9 June 1982 between Dato Abdullah Mohamed and Ban Lee, Dato Abdullah agreed to acquire from Ban Lee its 50% interest in City Centre at M$32 per share for M$40 million. In another agreement dated 15 June 1982 between Dato Abdullah and United Securities, Dato Abdullah agreed to assign the 50% interest to United Securities at cost. Since United Securities already had 50% of City Centre this exercise when completed would have resulted in City Centre becoming a wholly owned subsidiary of United Securities. Cheah Theam Swee, the first plaintiff, then held 200,330 shares and his brother Dr Cheah Theam Kheng 200,329 shares in United Securities. On 15 June 1982 Dato Abdullah entered into separate agreements with eight other shareholders of United Securities to acquire 699,850 shares of M$1 each, representing 63.6% of the issued share capital of United Securities at $39 per share for a total consideration of M$27,294,150. The result of this acquisition was to reorder the structure of United Securities so that Dato Abdullah had 63.6% and the first and second plaintiffs had 18.2% each of the equity of United Securities. Malaysian International Merchant Bankers Bhd (MIMB) were appointed to put the transaction through. MIMB applied to the Foreign Investment Committee for the necessary approval.

On 2 October 1982 City Centre charged the said land to the defendant bank to secure its 'existing borrowings' from its Kuala Lumpur branch. The first plaintiff alleged that these 'existing borrowings' included the sum of M$4,000,000 which